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No. 1284

In the Supreme Court of the United States

OCTOBER TERM, 1967

IRVING BURTON NESSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the latter part of 1961, petitioner, who was doing business as the Fiesta Furniture Company, began to experience difficulty meeting his financial obligations. In early February 1962, he entered into a trust mortgage agreement whereby he was to pay a certain sum to the trustee for his creditors each week. When petitioner failed to make the first payment on March 7, the trust mortgage was terminated, and at that time, he informed the attorney for the creditors that he was considering filing a voluntary bankruptcy petition (1 Tr. 35–41; 2 Tr. 82–83).[1]

[1] "Tr." preceded by the volume number refers to the three volume transcript of the trial proceedings; "1 R." refers to the record in the court below, copies of which are on file with the Clerk of this Court.

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Shortly thereafter, petitioner discounted several conditional sale contracts to the Time Finance Corporation and was paid by six checks which he received between March 16 and April 2, 1962. Petitioner did not deposit the checks in the bank account of the business (2 Tr. 58–59), but instead cashed them at another bank, at which he did not have an account (2 Tr. 51–52). On April 3, 1962, an involuntary bankruptcy petition was filed against petitioner, and he was adjudicated a bankrupt on April 18 of that year (1 Tr. 43; 2 Tr. 102–103; Gov. Ex. 14). The attorney for the trustee in bankruptcy testified that the only assets he received in petitioner's case were the proceeds of a sale of inventory and a check from an insurance company covering a fire loss incurred by petitioner in early 1962. He never received nor was he even informed about the checks petitioner received from Time Finance (1 Tr. 59–63, 67, 69, 81, 85–87).

Petitioner's failure to disclose the existence of five of the checks received from Time Finance and to turn over the proceeds to the trustee formed the basis of a five-count indictment charging that petitioner had fraudulently concealed assets from the trustee in bankrupty, in violation of 18 U.S.C. 152 (1 Tr. 8, 10–15, 28–30; Govt. Ex. 106). Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on all five counts, and was sentenced to concurrent terms of one year's imprisonment on each count. The court of appeals affirmed *per curiam* (Pet. App.).

Petitioner's sole objection to his conviction is based on the trial court's denial of his pretrial motion for a

bill of particulars, in which he sought, *inter alia,* the names of those from whom the funds alleged to have been concealed were obtained, the dates of the transactions, and all of the circumstances surrounding the obtaining of the funds and their subsequent concealment. Petitioner contends that the denial of this motion, together with the time lapse between the date of the offenses and the trial, prevented him from preparing an adequate defense.

However, the indictment set forth the dollar amounts alleged to have been concealed, the dates upon which the concealment initially occurred, and, on the first count, the source from whom the funds were received—the Time Finance Corporation. While that source was not disclosed on the face of the indictment as to counts two to five, petitioner's testimony at trial shows that he was not unaware that those counts also referred to funds received from Time Finance. Petitioner testified that he had used the proceeds of the Time Finance checks to purchase furniture, pay salesmen's commissions, and hire trucks to deliver the furniture. Although he was able to remember the names of those with whom he dealt during this period, he testified that the transactions had been conducted on a cash basis and he was unable to produce any records pertaining to them (2 Tr. 89–97; 3 Tr. 18–38). Moreover, petitioner's defense was predicated, as he concedes (Pet. 4), on alleged ignorance of the pendency of bankruptcy proceedings and on lack of fraudulent intent. To the extent that the source of the funds would have been material to that defense, which

was based on what petitioner did with the money after its receipt, it is evident from the record that he was not taken by surprise.

The purpose of Rule 7(f), Fed. R. Crim. P., is to require the disclosure of only those facts necessary to particularize the charge and prevent subsequent prosecution for the same offense. The revised rule does not require disclosure of the evidentiary details of the government's case. The determination of the need for a bill of particulars rests in the discretion of the district court, which was not abused in this case. See *Wilkins* v. *United States*, 376 F. 2d 552, 563 (C.A. 5), certiorari denied, 389 U.S. 964; *Ross* v. *United States*, 374 F. 2d 97, 103 (C.A. 8), certiorari denied, 389 U.S. 882; *Ray* v. *United States*, 367 F. 2d 258, 263 (C.A. 8), certiorari denied, 386 U.S. 913; *Cook* v. *United States* 354 F. 2d 529, 531 (C.A. 9). And the fact that petitioner appeared to have no difficulty specifying the numerous persons to whom he paid the proceeds of the Time Finance checks substantially refutes any claim that he was prejudiced either by the denial of the motion alone, or in conjunction with the lapse of time between the offenses and trial.[2] Indeed, although he could recall those persons—whose testimony would presumably have been

[2] It is clear that there was no "intentional or oppressive" delay in prosecuting this case. Petitioner's possible involvement in numerous bankruptcy schemes was under continuous investigation from early 1962 until the return of the 1966 indictment. The "delay" between the date of indictment, March 1966, and trial, May 1967, was occasioned primarily by the death of the judge to whom the case originally had been assigned.

crucial to his defense—petitioner acknowledged, upon questioning by the court, that he had made no attempt to find them and obtain their testimony (3 Tr. 52–53).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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